

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCEL E. SMITH,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 238165

Wayne Circuit Court

LC No. 01-000232

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon, MCL 750.224f, and felony-firearm, MCL 750.227b.¹ Defendant was sentenced to a prison term of forty-five to seventy-five years for the second-degree murder conviction to be served (1) concurrently with a term of six to ten years' imprisonment for the assault conviction and a term of three to five years' imprisonment for the firearm-possession conviction, and (2) consecutively to a two-year prison term for the felony-firearm conviction. Defendant's convictions resulted from his shooting of Daniel Baxter in the leg, and from aiding and abetting his brother, Lawrence Armstrong, in murdering Baxter's friend, Thomas McClain.² We affirm.

I. Prior Consistent Statement

Defendant first claims that Baxter's statement to Detroit Police Officer Derryck Thomas that one of the gunmen was "Lawrence's brother, Boobie, [i.e. defendant]" was inadmissible hearsay. Specifically, defendant argues that the trial court improperly admitted the statement as a prior consistent statement. Defendant claims that the statement could not be used as a prior consistent statement to rebut a charge of police influence because it was made *after* the police gave Baxter defendant's real name, which was the ground for the charge of influence.

¹ Defendant was charged with first-degree murder, MCL 750.316, and assault with intent to commit murder, MCL 750.83, but was convicted of the lesser offenses.

² Defendant was tried jointly with codefendant, Allistair McGhee. The jury acquitted McGhee of all charges. Defendant's brother, Lawrence Armstrong, was tried separately at a later date.

The admission of evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Hearsay is a statement, other than the one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted, and is generally inadmissible. MRE 801(c); MRE 802. In order for a prior consistent statement to be admissible under MRE 801(d)(1)(B), the following must be established:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made *prior* to the time that the supposed motive to falsify arose. [*Jones*, supra at 707 (citations omitted) (emphasis added).]

In this case, the officer who arrived at the crime scene testified that Baxter did not identify defendant as the one who shot and wounded him. The investigating officer, Officer Thomas, testified that Baxter identified defendant only *after* Thomas supplied Baxter with the names of the persons who were arrested for the shooting. However, Baxter insisted at trial that he identified "Lawrence's brother" and "Lawrence's brother, Boobie [i.e. defendant]" to the police both at the scene of the crime and in subsequent interviews, prior to the time in which the alleged improper influence occurred, but that the officers failed to include the information in their written reports. As such, this presented an issue of witness credibility for the jury to determine. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

Nonetheless, the statement fails to meet the fourth element because it was made *after* the time that the alleged improper police influence. Therefore, the trial court abused its discretion in admitting the statement into evidence as a prior consistent statement.³

However, defendant fails to demonstrate that the statement was prejudicial, particularly in light of the fact that it was defendant who brought out the statement on cross-examination in support of his claim of improper police influence. MRE 403; *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Accordingly, we find no error requiring reversal.

Defendant next argues that error requiring reversal occurred when Officer Thomas compounded the above statement with reference to the fact that defendant had been recently released from jail. Here, the prosecutor asked Officer Thomas whether Baxter provided any information about the driver of the vehicle at issue. Thomas's response was that Baxter said that the driver was "Boobie's friend," and that the driver had been in the neighborhood "ever since Boobie got out of jail."

³ Alternatively, this testimony was admissible as a prior statement of identification, made after perceiving the person identified, by a declarant, who testified and was subject to cross-examination. MRE 801(d)(1)(C). Such statements are not hearsay and are treated as substantive evidence. *People v Malone*, 445 Mich 369; 518 NW2d 418 (1994).

Because defendant failed to preserve the issue by an objection to the above testimony, our review of the record is for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The record shows that defendant stipulated at trial that he was a previously convicted felon for the charge of the possession of a firearm by a felon. Therefore, the jury was aware that defendant had previously been in jail. Defendant fails to show how his substantial rights were affected. *Carines, supra*.

Defendant next contends that the trial court erred by failing to give a standard jury instruction on the use of prior consistent statements. At trial, defendant expressed satisfaction with the instructions that were given. Thus, he must establish plain error that affected his substantial rights. *Carines, supra* at 766-767. Given that Officer Thomas' recitation of Baxter's statement actually assisted defendant's claim of improper influence, we conclude that defendant has failed to demonstrate plain error that requires reversal.

II. Statement of Prior Identification

Defendant next argues that the trial court abused its discretion when it admitted Baxter's statement that defendant was shooting at him from the car codefendant McGhee was driving. The court ruled that the prior identification statement was admissible under MRE 801(d)(1)(C), as interpreted by *People v Malone*, 445 Mich 369; 518 NW2d 418 (1994), and that Baxter had already testified to, and had been cross-examined over, this information. MRE 801(d)(1)(C) provides, in relevant part:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person

The declarant, Baxter, testified at trial and was subject to cross-examination concerning his photographic identification of codefendant McGhee. However, the statement went beyond merely identifying codefendant McGhee; it also included the further comment that codefendant was driving "the car that Lawrence's brother, Boobie, was in shooting at [Baxter]."

Here, Baxter identified McGhee as the driver and that he was *not* the shooter because *defendant* was the shooter. Both parts of this statement are statements of identification with respect to McGhee, made after Baxter perceived him. Further, Baxter testified at trial and was subject to cross-examination. He testified repeatedly that defendant was the one who was shooting at him while hanging out the window of the car that McGhee was driving. Accordingly, the statement satisfied MRE 801(d)(1)(C). That the statement was presented through the testimony of Thomas, a third-party, is irrelevant. *Malone, supra* at 389-390.

III. Motion for a Directed Verdict

Defendant argues that the trial court erred by denying his motion for a directed verdict on the charge of first-degree murder on an aiding and betting theory. Specifically, defendant argues that the evidence showed only that he shot at Baxter and wounded him in the leg; it did not show that he shot at McClain or that he intended to assist Armstrong in murdering McClain.

“When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). An intent to kill may be inferred from all the facts and circumstances. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). To establish that a defendant aided and abetted a crime, the prosecutor must prove that

(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime. [*Norris, supra* at 419-420 (citations omitted).]

The evidence in this case showed that Armstrong chased after and killed McClain while defendant shot and wounded McClain’s companion, Baxter. The shooting of Baxter occurred in concert with McClain’s murder. We conclude that the evidence was sufficient for a finding beyond a reasonable doubt that the first two elements of aiding and abetting were met.

Regarding defendant’s intent and premeditation, the evidence suggested that McClain and Baxter were involved in a previous shooting incident earlier that morning at defendant’s mother’s home. Later that day, Armstrong encountered McClain and Baxter at a local market. Armstrong made a cellular phone call as McClain and Baxter left the market. Shortly thereafter, Armstrong followed McClain and Baxter and chased McClain with a gun. Within seconds, two vehicles appeared whose occupants immediately began shooting at Baxter. Baxter identified defendant as one of the shooters. The evidence indicated that defendant used a weapon that had earlier been seen in his presence at his mother’s house, and that was subsequently seized from that location.

From the above, the evidence was sufficient for a jury to find beyond a reasonable doubt that Armstrong decided to shoot McClain when he saw him at the market because of the earlier shooting incident, and that he called defendant at his mother’s home a few streets away for defendant’s assistance in the shooting. Given that defendant was shooting *at* Baxter and that one of his shots struck Baxter in the ankle, it was reasonable beyond a doubt to infer that defendant intended to kill Baxter and that defendant shared Armstrong’s intent to kill McClain. While Armstrong dealt with McClain, his brother, defendant, dealt with Baxter. Alternatively, as the trial court reasoned, the jury could have concluded that defendant knew Armstrong intended to murder McClain and assisted him by shooting at Baxter to prevent Baxter from interfering with

McClain's murder. We conclude that the trial court properly denied defendant's motion for a directed verdict.

IV. The Effective Assistance of Counsel

Defendant next contends that his trial counsel was ineffective for several reasons. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This court reviews the trial court's findings of fact for clear error and reviews de novo its conclusions of law. *Id.* To establish ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant first argues that his counsel was ineffective for failing to procure the presence of one of the prosecutor's witness, Marcus Irvine. At trial, the prosecutor conceded that due diligence was lacking in her attempt to serve Irvine with a subpoena. Accordingly, the trial court instructed the jury with the adverse witness jury instruction. Defendant argues that Irvine's testimony was crucial to his case because, at Armstrong's subsequent trial, Irvine could not identify one of the shooters who accompanied Armstrong because that shooter's face was hooded.⁴ Defendant asserts that Irvine's testimony would have cast doubt on Baxter's identification of defendant as one of the shooters.

The decision whether to call a witness is presumed to be a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). This Court will not second-guess decisions based on trial strategy. *Pickens, supra* at 330. A failure to call a witness will only constitute ineffective assistance of counsel when it deprives a defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Our review of the record shows that the substance of Irvine's testimony was presented through the testimony of two police officers. Furthermore, at the *Ginther*⁵ hearing, trial counsel testified that he doubted whether he would have insisted that Irvine be called to testify even if the prosecutor had been able to locate Irvine. Counsel testified that his objective at the trial was to de-emphasize the connection between defendant and his brother, Armstrong. Counsel specifically did not want that portion of Irvine's eye-witness testimony that would have identified Armstrong as the man who shot and killed McClain. Further, counsel stated that Irvine identified the attire and build of the unidentified shooter and it appears from the *Ginther* hearing transcript that Irvine's description of the shooter fit that of defendant's build. Trial counsel testified that he deliberately made use of the favorable adverse witness jury instruction and that he argued before the jury that Irvine's testimony would have been adverse to the prosecution. From the above, we conclude that defendant failed to demonstrate that his

⁴ Although the gist of defendant's claim is that Irvine's subsequent testimony at the separate trial of defendant's brother, Lawrence Armstrong, was beneficial to defendant, he does not provide this Court with a copy of the testimony.

⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel's trial strategy with respect to Irvine's absence deprived him of effective assistance.

Defendant next argues that his counsel was ineffective for failing to request a curative instruction concerning Officer's Thomas' reference to defendant's previous incarceration. At the *Ginther* hearing, counsel explained that he did not object to this specific comment because he believed that specifically objecting would "accent" the matter in the jury's mind. He further stated that he did not request a curative instruction because he did not consider it crucial enough to warrant a cautionary instruction.

From the above, we conclude that trial counsel provided a reasonable explanation concerning his strategic reasons for not objecting to the testimony at dispute and for not requesting a cautionary instruction, and because this isolated remark did not constitute outcome-determinative prejudice. Thus, defendant has failed to overcome the presumption that his counsel provided effective assistance of counsel.

Defendant finally claims that his counsel's failure to challenge four prospective jurors deprived him of the effective assistance of counsel. A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury, and decisions regarding which jurors to accept are the province of the attorney after consultation with his client. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). The strategic decision not to challenge a juror cannot be held to be ineffective assistance of counsel. *Id.*

At the *Ginther* hearing, trial counsel testified that he considered the jurors' body language, the manner in which each juror looked at defendant, the race and gender of the jurors, and the make-up of the remaining jury pool that would replace an excused juror. Further, counsel testified that defendant did not express any concern about any of the above-mentioned jurors. Here, there was no showing that the jurors were biased. There is no showing that counsel was ineffective in failing to challenge these jurors.

V. Constitutional Right to Due Process of Law

Defendant finally claims that the above alleged errors are so fundamentally unfair that they denied him of the constitutional right to due process of law. Because defendant failed to preserve this issue, our review is limited to plain error that affected defendant's substantial rights. *Carines, supra* at 752-753.

Defendant does not properly brief this issue on appeal and has not explained how the above errors constitute claims of violations of constitutional due process of law. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Therefore, defendant has failed to demonstrate a violation of the constitutional right to due process of law.

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot